

ORIGINAL

EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)

SBC Communications Inc. and)
BellSouth Corporation)

For Consent to Transfer Control of)
or Assign Domestic Mobile Wireless)
Authorizations to Alloy, LLC)

WT Dkt. No. 00-81

ORIGINAL

**EX PARTE RESPONSE OF SBC AND BELL SOUTH TO REPLY TO
APPLICANT'S RESPONSE TO PETITION TO DISMISS OR DENY**

SBC and BellSouth ("Applicants") hereby file this *ex parte* response to the
"Reply to Applicant's Response to Petition to Dismiss or Deny" (the "Reply") filed by
Thumb Cellular Limited Partnership ("Thumb").

In their initial response to Thumb's Petition, Applicants demonstrated that
Thumb's claims are not properly before the Commission in this proceeding because they
involve state law contract issues that, under long-established policy, the Commission will
not decide,¹ and that Thumb failed to raise any meritorious character issue concerning

¹ See Response of SBC and BellSouth to Petition to Dismiss or Deny at 8-9 (the
"Initial Response") (filed June 29, 2000). Moreover, even if the Commission decided to
depart from its long-standing policy and involve itself in this matter, there is a pending
proceeding (Thumb's opposition to the *pro forma* grant of the transfer of SBC's minority

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SBC. Applicants nonetheless supplied the Commission with (1) certain basic partnership documents (the partnership agreement and Thumb's filings with the State of Michigan showing that Michigan partnership records reflect that Ameritech is presently a 23% limited partner, none of which was referred to or supplied by Thumb in its reply); (2) a letter from the general partner (Agri Valley) specifically acknowledging that once Ameritech's MFJ limitation was cured Agri Valley would no longer unilaterally attempt to exclude Ameritech from the partnership²; and (3) a declaration from an attorney at Ameritech indicating that the company believed it owned the interest.

Thumb's Reply shows why such matters are best left to the courts. Although it concedes that its claims will have to be resolved in court,³ Thumb goes on to argue at great length, citing its FCC Form 430 filing, various sections of the partnership agreement and a letter from an Ameritech representative, that it unilaterally ousted Ameritech from the partnership. All that these arguments show, however, is that both SBC and Thumb agree that there is a state law dispute between the parties that needs to be decided in another forum and not by the Commission. Accordingly, Thumb's Petition should be dismissed.

Since the underlying dispute is not properly before the Commission, we will not respond in detail to all of Thumb's factual allegations. Applicants do note, however, that

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partnership interest in Thumb) in which Thumb has raised this issue. See Initial Response at 9-11.

² There is no dispute that the problem - Thumb's decision to offer interLATA service - did in fact disappear when the 1996 Telecom Act was enacted.

³ See Reply at 2 ("the Commission's processes are not used to resolve contractual disputes, including claims to ownership interests; such contractual claims are to be litigated in the appropriate judicial forum").

while Thumb cites numerous provisions of the partnership agreement (which its original Petition failed even to mention), none of those sections state that Thumb may unilaterally remove a limited partner simply because it is subject to the MFJ. More importantly, Thumb cites a letter (the “April 1996 Letter”) from Stephanie Cassioppi, an Ameritech employee, to Thumb, and gives its interpretation to the effect that this letter admitted that Ameritech “has no ownership interest” in Thumb.⁴ As set forth in the Declaration of Ms. Cassioppi (Exhibit A hereto), a non-attorney, she states that she was attempting to convey that Ameritech “had been precluded from participating”⁵ in the partnership and should be allowed its full partnership rights since the MFJ problem had been eliminated.

Indeed, far from supporting Thumb, the April 1996 letter provides additional support for SBC’s position. In its 1991 letter purporting unilaterally to deprive Ameritech of its partnership interest, Thumb stated that the reason for its action was that Ameritech was subject to the interLATA restrictions of the MFJ. That letter also stated, however, that Thumb would discontinue its unilateral efforts to exclude Ameritech from the partnership and that Ameritech could resume its participation in the partnership if a waiver of those restrictions could be obtained.⁶ Since the 1996 Act removed the interLATA restrictions, there appeared to be no further basis for Thumb’s attempt to exclude Ameritech. Accordingly, while Ms. Cassioppi did not believe that Thumb had the right to exclude Ameritech in the first place, her letter suggested that, in view of the

⁴ See Reply at 4.

⁵ See Reply at 4. This statement was true; Thumb purported to oust Ameritech and thereafter refused to allow it to participate. Ameritech consistently denied that Thumb had any right to do this, and Ms. Cassioppi never intended to concede that Thumb had any such right. See Cassioppi Declaration, ¶¶ 2-3.

1996 Act, the matter should now be resolved and that Thumb should again recognize Ameritech as a partner.⁷ Because Thumb's rationale for excluding Ameritech went away, and because Thumb agreed that Ameritech could continue as a partner if that happened, it is hard to understand why Thumb continues to insist that there is no basis for SBC's claim.

Thus, SBC had a good faith basis for believing that Ameritech held a 23% limited partnership interest in Thumb when it filed the *pro forma* transfer notification.⁸

In sum:

- The state's partnership records reflected that Ameritech held the interest;
- Thumb had sent a letter to Ameritech stating that it could resume partnership activities once the MFJ issue disappeared, and the restriction disappeared in 1996; and

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⁶ See Letter dated August 30, 1991 from Edwin H. Eichler to John Cusack (previously submitted as Exhibit 3 to the Beard Declaration).

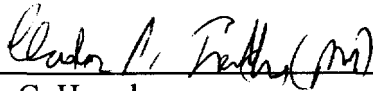
⁷ Cassioppi Declaration, ¶¶ 2-3.

⁸ As indicated in Applicants' previous response, the *pro forma* notification of SBC's acquisition of a non-controlling limited partnership interest in Thumb was appropriate pursuant to Section 1.948(c)(1) of the Commission's rules. See Initial Response at 3. Specifically, in the *Forbearance Order* adopting *pro forma* notification procedures, the Commission indicated that such notifications were proper for transactions involving the "assignment of less than a controlling interest in a partnership." *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, 13 FCC Rcd. 6293, ¶ 8 (1998). The Commission should take this opportunity to clarify that such filings need not be made in the future. In *McCaw Cellular Communications, Inc.* 4 FCC Rcd. 3784, ¶50 (Com. Car. Bur. 1989), the Bureau made clear that, under Section 310(d) of the Communications Act, filings with the Commission are only necessary where there is a transfer of control (de jure or de facto) or an assignment of license. As a result, the *pro forma* transfer of control applications filed by McCaw were dismissed because only a minority non-controlling interest was involved.

- The Partnership Agreement itself allowed any party that would be adversely affected by an MFJ prohibited line of business to not participate in the activity and did not reflect it must withdraw from the entire partnership.⁹

CONCLUSION

For the reasons set forth above and in Applicants' Initial Response, Thumb's Petition should be summarily dismissed, and the applications of SBC and BellSouth should be granted expeditiously. This proceeding is not the place, and this Commission is not the tribunal, to make the ultimate decision as to whether Ameritech retains a partnership interest in Thumb. SBC had ample grounds for asserting the existence of such an interest, and, however, the dispute between SBC and Thumb is ultimately resolved, that dispute between Ameritech and Thumb provides absolutely no basis for raising any questions about SBC's character.

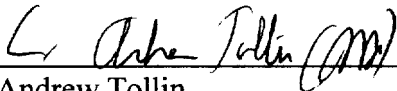


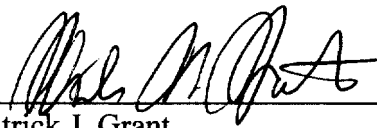
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⁹ In analogous situations, the DOJ was allowing partners that were court constrained by certain MFJ prohibitions to be separated from the MFJ-prohibited activities (e.g., establishment of separate companies).


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DATED: July 21, 2000

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DECLARATION OF STEPHANIE CASSIOPPI

1. My name is Stephanie Cassioppi. I was formerly employed by Ameritech Mobile Communications, Inc. ("AMCI"). In 1996, my title was Director – External Affairs. While at AMCI, I was responsible for all wireless legislative and regulatory matters, as well as partnership issues.

2. AMCI was one of the original limited partners in Thumb Cellular Limited Partnership ("Thumb"). During the early 1990s, however, Thumb attempted to remove AMCI as a limited partner so that Thumb would not be subject to the interLATA restrictions of the Modification of Final Judgment. AMCI never agreed that Thumb could take away its partnership interest in this manner, and it consistently maintained that it retained its partnership interest in Thumb. In fact, Thumb stated that it would not oppose AMCI as a partner if those restrictions could be removed.

CERTIFICATE OF SERVICE

I, Philip W. Horton, hereby certify that a copy of the foregoing *Ex Parte*
Response of SBC and BellSouth to Reply to Applicants' Response to Petition to Dismiss
or Deny was served by hand this 21st day of July, 2000, on the following persons:

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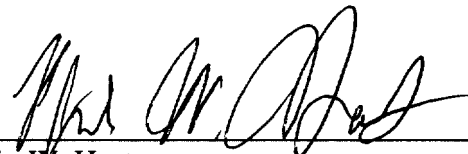
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